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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 17 71-17

JOHN B. TUMMINELLO,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FRANCIS B. BURCH,
Attorney General of Maryland,
EDWARD F. BORGERDING,
Assistant Attorney General
of Maryland,
Chief, Criminal Division,
GILBERT ROSENTHAL,
Assistant Attorney General
of Maryland,
One South Calvert Building,
Baltimore, Maryland 21202,
For Respondent.

The Daily Record Co., Baltimore, Md. 21203

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PRELIMINARY COMMENTS

This Brief in Opposition to the Petition for Writ of Certiorari is filed pursuant to the request of this Honorable Court.

OPINION BELOW

The opinion and judgment of the Court of Special Appeals are reported at 10 Md. App. 612, 272 A. 2d 77 (1971), and are printed as Appendix A of the Petitioner's brief.

QUESTIONS PRESENTED

1. Was Petitioner's right to confrontation under the Sixth Amendment violated when the testimony of the prosecuting witness, which was taken at the prior trial, was read into evidence at the time of Petitioner's second trial because the prosecuting witness was mentally ill and declared to be unavailable?

2. Was Petitioner's right to due process under the Fourteenth Amendment violated when the transcript of a tape recording, a portion of which was inaudible, and in which the voice uttering the incriminating statements was never directly identified as that of the Petitioner, was admitted into evidence?

CONSTITUTIONAL AMENDMENTS INVOLVED

The Sixth Amendment to the Constitution of the United States provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the Constitution of the United States provides, in part:

> "No State shall * * * deprive any person of life, liberty, or property, without due process of law * * *."

STATEMENT OF THE CASE

After Petitioner's original conviction for false pretenses in a jury trial held in the Criminal Court of Baltimore on August 4, 1968 was reversed by the Court of Special Ap-

peals of Maryland on August 5, 1969,[1] Petitioner was retried and found guilty on December 9, 1969 of the same offense at a second jury trial in the Criminal Court of Baltimore and sentenced to the jurisdiction of the Department of Correctional Services for a period of three (3) years.

In 1966, one Sewell had been convicted of a crime and was sentenced to a term of imprisonment (T. 194).[2] It was at this time that Father Maloney met Sewell. Father Maloney opened a bank account for Sewell in their joint names, in an effort to handle Sewell's financial affairs during the time in which Sewell was serving the term of his imprisonment (T. 193-194). At Sewell's direction, Father Maloney withdrew $300 on February 24, 1967, for an attorney's fee and $500 on April 5, 1967, for a bondsman (T. 197-198) whom Father identified in court as being Petitioner (T. 199). Petitioner called Father Maloney five days later and advised Father that he was coming to get the money in order to get Sewell out of jail. When Petitioner arrived, the Father testified that Petitioner asked for $600.00 and said that the additional $100 was for people who had to be paid off in order to "fix" the case (T. 200-202). Father asked for a receipt, and Petitioner wrote "$600 paid, held in escrow for Robert Sewell" on the back of his business card and gave it to Father (T. 204-206). Father Maloney further

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[1] *Tumminello v. State*, 7 Md. App. 380, 256 A. 2d 342 (1969). This reversal was not predicated upon any of the grounds relied upon by Petitioner in the present Petition for a Writ of Certiorari.

[2] Unless otherwise indicated, all references to the transcript relate to the second trial of Petitioner which began on December 8, 1969, and is the subject of this Petition for Writ of Certiorari. Where it is necessary to refer to the transcript of record of Petitioner's first trial, the Respondent will use the same system and nomenclature as suggested by Petitioner in his Footnote No. 1. Therefore, when referring to the first trial, the preface "I" will refer to the transcript of the first trial; the letters "A", "B", etc., will refer to the volume of the transcript of the first trial which is involved, and the final number used will refer to the page of the cited volume.

testified that Petitioner stated that the money would be repaid "if it couldn't be arranged" (T. 206). There was no discussion concerning a bail bond. Four days later Sewell was out of prison and was brought home by Petitioner (T. 207). Sewell asked Father to drive him to the bank to obtain $300 more (T. 208). Sewell's bank book showed a withdrawal of $300 on April 14, 1967, and Sewell had the $300 with him when he got into Petitioner's car (T. 209). On cross-examination, Father Maloney reiterated that the money was to be used to have the case "fixed" (T. 219).

Petitioner advised Sewell that the former could "spring" Sewell for $1,000 (T. 294). Of this money, Judge Cullen[3] would receive $500, the State's Attorney or Clerk of Court would receive $500, but Petitioner "wasn't making anything out of it himself" (T. 295). The Petitioner started to demand additional monies, and threatened that if the additional monies were not obtained, Judge Cullen would send Sewell back to prison for four years (T. 306-307). Because of these threats, and Sewell's fear that Petitioner would have Sewell sent back to prison (T. 309), Sewell was finally taken to the State's Attorney's Office by an attorney (T. 310).

On May 24, 1967 there was a meeting in the State's Attorney's office of several police officers, two Assistant State's Attorneys and Robert Sewell (T. 479). Sgt. Armstrong made the affidavit to Judge Prendergast that there was probable cause for the issuance of the search and seizure warrant (T. 484). He acknowledged that his affidavit of probable cause was based upon the assumption that the statements made by Sewell were correct (T. 486). The then State's Attorney, Charles E. Moylan, Jr., had signed

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[3] Judge James K. Cullen of the Criminal Court of Baltimore had sentenced Sewell to the Maryland House of Correction for a period of four years.

the complaint which lead to the issuance of the arrest warrant (T. 487). Mr. Moylan testified that he questioned Sewell and was impressed that Sewell was a reasonably responsible witness (T. 511-513). Had Mr. Moylan known of Sewell's mental condition, he would have presented that information to Judge Prendergast (T. 415). Sgt. Armstrong was also unaware of Sewell's mental disorder (T. 490).

A court order was also obtained to allow Sewell to be outfitted with an electronic recording device (T. 510). Both Sgt. Armstrong and Sgt. Steven Tabling saw Sewell outfitted with the electronic device, and they both observed that Sewell was given $150 in pre-recorded money (T. 480-481, 466). All of the officers took up positions where they could observe Petitioner's office (T. 467). Sgt. Armstrong observed Sewell meet Petitioner and after a brief conversation, the two entered Petitioner's office (T. 481).

Marshall Meyer had furnished the State's Attorney's Office with the electronic device used by Sewell (T. 398). As the conversation was transmitted, Meyers tape recorded the same from his automobile (T. 400). Sgt. Tabling was also in Meyers' automobile and heard the voices which were transmitted from the electronic device to the tape recorder (T. 467-468).[4] Meyers than gave the tape to the Assistant State's Attorney (T. 405).

A court stenographer, Yale Aarons, did not know Sewell or Petitioner (T. 425). He stated that the voices on the

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[4] At a pre-arranged signal, Sgt. Armstrong, Sgt. Tabling, Officer Nevin and an Assistant State's Attorney entered the building with their search and seizure warrant and the arrest warrant (T. 482). The warrants were shown to Petitioner (T. 482). Petitioner emptied his pockets, and both Sgt. Tabling and Sgt. Armstrong testified that Petitioner stated, in essence, "There is the money he gave me, that's what you are looking for" (T. 469, 483). The money which came out of Petitioner's pocket corresponded to the same serial numbers which had been pre-recorded (T. 469-483).

tape were identified by one of the Assistant State's Attorneys (T. 426), and that he was certain that all of the testimony transcribed from the tape recorder which referred to "S" was the same person, and all the testimony referred to as "T" was the same person (T. 423). Mr. Aarons was only successful in transcribing the middle portion of the tape, and he testified that the first and last parts of the tape were completely unintelligible (T. 424-425).

Rather than reiterate Sewell's mental condition as set forth in the record, the Respondent adopts the Petitioner's Statement of the Case at pages 11 through 13 of the Petition for a Writ of Certiorari, with the exception of the footnotes contained therein. Petitioner's second trial was approximately twenty months after the first trial. Sewell's mental condition had deteriorated to such an extent during this period of time that the trial court held that Sewell was so incompetent to testify at the time of the second trial as to be declared an unavailable witness. Accordingly, the trial court determined that Sewell's testimony given at the prior trial would be admissible at the second trial of Petitioner (T. 155). Based upon this determination, Sewell's testimony from the first trial was subsequently read to the jury at the time of Petitioner's second trial (T. 288-390).

With reference to the tape recording of the conversation between Sewell and Petitioner, the *Defense* objected to the identification of the voices on the tape. As the result of this objection, the trial court ordered the voices designated as "1" and "2" instead of "S" and "T" as they appeared in the transcript which Aarons had prepared (T. 432-442). The transcript of the tape was then read to the jury (T. 451-462).

ARGUMENT

I.

THE PETITIONER'S RIGHT TO CONFRONTATION UNDER THE SIXTH AMENDMENT WAS NOT VIOLATED WHEN THE TESTIMONY OF THE PROSECUTING WITNESS, WHICH WAS TAKEN AT THE PRIOR TRIAL, WAS READ INTO EVIDENCE AT THE TIME OF PETITIONER'S SECOND TRIAL BECAUSE THE PROSECUTING WITNESS WAS MENTALLY ILL AND DECLARED TO BE UNAVAILABLE.

If nothing more, Petitioner's entire argument substantiates the fact that it would have been totally impossible to allow Sewell to have testified at the time of Petitioner's second trial. Petitioner's quote of the prosecution's psychiatric witness (Pet. 17) was received at the time of Petitioner's *second* trial, and helps to narrow the entire issue. Therefore, the Respondent would submit that the only question upon which the Petitioner relies is whether or not Sewell should have been allowed to testify at the time of Petitioner's first trial. It is the Petitioner's general contention that Sewell, the chief prosecuting witness, "was an insane criminal who had not one psychotic disability but four: paranoia, schizophrenia, brain damage and epilepsy *grand mal*" (Pet. 17). Petitioner's contention that Sewell's testimony, standing by itself, was "riddled with conflicts, contradictions and utter confusion" (Pet. 17) is nothing more than a mere bald allegation without any substantiation whatsoever. Assuming that there may have been some discrepancies in Sewell's testimony, Sewell's testimony taken in its totality would be a question for the jury, as the trier of fact, to determine. The jury would determine whether or not to believe Sewell, and this would be true whether reference is made to the jury in Petitioner's first case wherein Sewell was personally present and testified, or the jury in the second case wherein Sewell's testimony from the first trial was read to them.

The Respondent acknowledges that the record is replete with references that Sewell had been suffering from various stages of mental illness for a long period of time. However, it is interesting to note that Sewell was convicted of a crime and sentenced by Judge Albert L. Sklar in 1966; and again convicted and sentenced by Judge James K. Cullen later the same year. The tape recording of the conversation between Sewell and Petitioner took place on May 24, 1967 (T. 479), and Petitioner was first tried on March 27, 1968. The transcript of the tape recording, which was read to the jury at the time of the second trial (T. 451-462), corresponds to a great extent with the testimony which Sewell had given personally at Petitioner's first trial and which was read to the jury at Petitioner's second trial (T. 312-316). It is the Respondent's position that all of the above substantiate the fact that Sewell was not so incompetent at the time of Petitioner's first trial to warrant the complete disregard of the testimony he personally gave then. Conversely, the Respondent would submit that because of Sewell's condition at the time of the Petitioner's second trial, no error was committed in allowing Sewell's original testimony to have been read to the jury at the second trial. To have had Sewell present at the time of the second trial, as apparently suggested by the Petitioner (Pet. 19), would have served absolutely no purpose whatsoever with regard to Sewell's testimony at the time of Petitioner's first trial. The presence of Sewell would have merely added substance to the trial court's finding, based upon psychiatric evidence introduced preliminarily, that Sewell was "unavailable" to testify personally at Petitioner's second trial.

The Petitioner recognizes "the general rule that the prior testimony of a witness may be read to the jury if the witness is no longer 'available' and if full cross-examination was allowed when the testimony was originally given"

(Pet. 19). Although the Petitioner argues otherwise, a review of the cross-examination of Sewell by Petitioner's trial counsel at the time of the first trial, does not demonstrate that the cross-examination of Sewell was incomplete.

While it may be true that the psychiatrist who concluded that Sewell was not competent to participate in Petitioner's second trial, stated that Sewell had been suffering from a mental disease for many years, this point does not appear to control the specific question of Sewell's sanity at the time of Petitioner's first trial. The same psychiatrist further stated that he was unable to determine with certainty the intensity of the disease in March of 1968 (the date of the original trial of Petitioner), because he had not examined Sewell at that time. It was further pointed out that Sewell's mental condition would "go up and down" (T. 65-66). In response to questions by the trial court, the psychiatrist stated that he could not be precise in determining whether or not a specific patient would give an accurate account of events without examining the patient (T. 66-67), although he did admit that it could be likely that Sewell was subject to the same deficiencies in March, 1968 as at the time of the Petitioner's second trial. Conversely, the psychiatrist testified that it was also possible that Sewell was in a state of remission at the time of Petitioner's previous trial, thereby making Sewell's testimony reasonably accurate (T. 71).

The cases cited by Petitioner do not appear to be of appreciable value in his attempt to have this Court grant a Petition for a Writ of Certiorari. *People v. McCaughan*, 49 Cal. 2d 409, 317 P. 2d 974 (1957), cited as Footnote 28 in Petitioner's Brief at page 18, involved the manslaughter conviction of a psychiatric technician in a state mental hospital. The question before the Court was whether or not two mentally defective patients should be allowed to

testify. Ironically, the trial court held that the mental patients were *qualified* to testify against Dr. McCaughan, and the appellate court upheld this decision. This was so in spite of a California Statute which related, in essence, that those who are of unsound mind at the time of their examination in court may not testify. Nevertheless, the Court determined that the question of sanity was to be determined at the time the witness was produced for examination. The Court at page 981 held the following:

> "Whether he did proceed accurately, does recollect, and is communicating accurately and truthfully, are questions of credibility to be resolved by the trier of fact."
>
> * * * * * *
>
> "It is universally recognized that the competency of a witness is to be determined by the trial court in the exercise of its judicial discretion."

The second statement above quoted immediately preceded the quote used by the Petitioner. It would be the Respondent's position that the principles set forth in *McCaughan* were followed in Petitioner's case. In the event that Sewell's sanity was not questioned at the time of Petitioner's first trial, the Respondent would take the position that Petitioner may have waived the question of Sewell's sanity at the time of the first trial.[5] In any event, it is further submitted by the Respondent that the trial court did not err in determining that Sewell was apparently competent to testify as a witness *at the time of his examination, i.e.,* Petitioner's first trial.

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[5] The question of Sewell's sanity was not raised directly on appeal of Petitioner's first trial. Petitioner did raise the point concerning whether or not the trial court limited Petitioner's trial counsel's cross-examination of Sewell when an objection was sustained to the inquiry of whether Sewell had requested a psychiatric examination when Sewell was convicted of assault.

While it may be true, as suggested by Petitioner (Pet. 20), that *Barber v. Page*, 390 U.S. 719 (1968) stressed the importance of having a witness made available for trial rather than relying upon his testimony from a prior hearing being read to the jury, the factual situation in *Barber* is simply inapplicable. In *Barber*, the "unavailable" witness was in a federal prison, and could have been produced at a subsequent trial in order to personally testify. In the instant case, Sewell was unequivocally "unavailable" because of his mental incapacity and inability to testify.

In the same context, *Washington v. Texas*, 388 U.S. 14 (1967) is of no avail to Petitioner. Factually, Washington's conviction was reversed because "the State arbitrarily denied him the right to put on the stand a witness who was *physically and mentally capable of testifying* to events which he personally observed * * *" see Page 22. (Emphasis supplied.) There is no question but that Sewell was not physically and mentally capable of testifying at the time of Petitioner's second trial.

Finally, the reasons given by the Court of Special Appeals of Maryland for rejecting Petitioner's contention that Sewell was incompetent at the time of Petitioner's first trial are sufficient in considering Petitioner's Writ of Certiorari. The appellate court agreed with the trial court that the testimony elicited at Petitioner's second trial was not sufficient to overcome the presumption that Sewell was sane at the time he testified at Petitioner's first trial (Pet. 8a).

II.

THE PETITIONER'S RIGHT TO DUE PROCESS, UNDER THE FOURTEENTH AMENDMENT, WAS NOT VIOLATED WHEN THE TRANSCRIPT OF A TAPE RECORDING, A PORTION OF WHICH WAS INAUDIBLE, AND IN WHICH THE VOICE UTTERING THE INCRIMINATING STATEMENTS WAS NEVER DIRECTLY IDENTIFIED AS THAT OF THE PETITIONER, WAS ADMITTED INTO EVIDENCE.

The Respondent does not dispute the fact that it was necessary for Mr. Aarons to repeatedly replay portions of the tape in question in order to make the stenographic transcript of the conversations on the recording (T. 417-418). However, the Respondent would submit that this contention of the Petitioner, as well as all of the other contentions of the Petitioner concerning the tape, would go to the weight to be assigned to the transcript of the tape, rather than the admissibility of the same. *Lynch v. State*, 2 Md. App. 546, 236 A. 2d 45 (1967). See also *McGuire v. State*, 200 Md. 601, 92 A. 2d 582 (1952) wherein the stenographic transcript was admitted in evidence as secondary evidence because the tape could not be replayed on the tape recorder.

Petitioner has cited several cases which appear to hold that the notes transcribed by a stenotype operator are not admissible in evidence where the recording is either unintelligible or must be repeatedly replayed in an effort to have the conversation transcribed (Pet. 22-24). However, each of these cases also indicate that an individual may testify to the conversations which have been recorded. In the instant case, a portion of Sewell's testimony which was read to the jury (T. 312-316) was virtually the same as the conversations contained in the transcript (T. 451-462). Included were the conversations concerning the obtaining of the money under false pretenses, Petitioner's instructions to Sewell not to give his attorney any additional fee, and

Petitioner's assistance to Sewell in trying to help Sewell obtain a job. The Respondent would further submit that Sewell's testimony was sufficient to properly identify the voices as those of Sewell and Petitioner.

In *Fountain v. United States,* 384 F. 2d 624 (5th Cir., 1967), a telephone conversation was recorded. An objection was raised to the reception in evidence of the copies of the recording rather than the use of the original tapes because a noise suppression process was used. A major factor in *Fountain* was the strong showing of the accuracy and reliability of the copy, and its value in making the conversations more easily discernible to the jury. In this same context, there does not appear to have ever been an objection by the Petitioner that the transcript was either inaccurate or unreliable, with the possible exception that it was necessary to replay the tape several times in order for Mr. Aarons to make the transcript. Therefore, the Respondent would again submit that all of the Petitioner's contentions go merely to the weight given the transcript, rather than to its admissibility.

In *Johns v. United States,* 323 F. 2d 421 (5th Cir., 1963), it was held that secondary evidence may be admitted where the original was unintelligible. See also 4 Wigmore, *Evidence* §§1229-1230 (3rd Ed., 1940). In *Johns,* the recording was available, but because the volume could not be turned up loud enough for the jury to hear the recording, a copy of the recording, which was conceded to be accurate, was allowed to be introduced into evidence.

As pointed out by the trial court at Petitioner's second trial (T. 440), it was Petitioner's trial counsel who brought out the identification of the voices on the tape as those of Mr. Sewell and Petitioner. This was during the cross-examination of Mr. Aarons (T 426-428). As the transcript was read to the jury, the parties were identified as number

"1" and "2". Although it may be true that Sewell, at the time of Petitioner's first trial did not specifically identify the voices on the tape as those of Petitioner and his own (Sewell's), it was brought to the attention of the trial court that the transcript of the tape was similar to the testimony of Sewell (T. 437-438). This, therefore, would be sufficient to identify the voices for the benefit of the jury. Accordingly, the Respondent would submit that there was no prejudicial error in allowing the jury to hear the transcript of the taped conversation, rather than the tape itself.

CONCLUSION

Since it was determined that Sewell was actually unavailable at the time of Petitioner's second trial, the reading of Sewell's testimony, which was elicited at the time of Petitioner's first trial, in lieu of his presence at the trial, was warranted. Any objection by Petitioner to the transcript of the taped conversation between Petitioner and Sewell relates to the weight to be given to the transcript, rather than to the admissibility of the conversation itself. Accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

FRANCIS B. BURCH,
Attorney General of Maryland,

EDWARD F. BORGERDING,
Assistant Attorney General
of Maryland,
Chief, Criminal Division,

GILBERT ROSENTHAL,
Assistant Attorney General
of Maryland,

For Respondent.